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No. 82-575

In the Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
PETITIONER

v.

UNITED STATES POSTAL SERVICE, SAN FRANCISCO BULK MAIL CENTER, RICHMOND, CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly refused to enforce an arbitration award requiring the Postal Service to reinstate an employee found by the court to have engaged in a strike against the Service, on the ground that the award was inconsistent with 5 U.S.C. 7311, which prohibits an individual from holding "a position in the Government of the United States * * * if he * * * participates in a strike" against the United States.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 682 F.2d 1280. The order of the district court (Pet. App. 15a-16a) and the award of the arbitrator (Pet. App. 17a-21a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 1982. On August 31, 1982, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to October 1, 1982, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On July 21, 1978, Michael Murphy, a postal employee at the bulk mail facility of the United States Postal Service located in Richmond, California, was informed that a strike

was planned for the bulk mail center the following day (Pet. App. 2a). He arrived at the facility the next morning and observed a group of co-workers and union officers establishing a picket line at the main entrance. Although Murphy was advised that "no one would be prevented from crossing" the line (*ibid.*), he nonetheless feared verbal abuse and possible future reprisals, and so telephoned his superiors to tell them that he would not violate the picket line (*id.* at 19a). Instead of returning home, however, Murphy joined the picket line for about an hour because he "was in their union." *Id.* at 2a. Murphy then learned that the strike was not sanctioned by the national union, and thereafter declined to participate further on the picket line. Nevertheless, Murphy called in and reported that he was unwilling to cross the line on the next three work days. On July 27, 1982, Murphy received formal notice of the termination of his employment with the Postal Service (*id.* at 3a).

Petitioner, the collective bargaining agent for federal postal clerks, processed Murphy's grievance to arbitration under the collective bargaining agreement with the Postal Service, claiming that Murphy was discharged without "just cause" (Pet. App. 17a). See 39 U.S.C. 1206.[1] After a

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[1]Postal workers are in the postal career service, which is part of the civil service. 39 U.S.C. 1001(b). See also 39 U.S.C. 201. Generally speaking, most federal employees represented by a bargaining representative may choose to have their discharges reviewed either under the grievance and arbitration provisions of the collective bargaining agreement or by the Merit Systems Protection Board (MSPB). 5 U.S.C. (Supp. V) 7121(e)(1) and 7512. Employees of the Postal Service, on the other hand, have the option of proceeding before the MSPB only if they are "preference eligible" employees. 5 U.S.C. (Supp. V) 7511(a)(1)(B). In other respects, employees of the Postal Service are placed under the jurisdiction of the National Labor Relations Act (39 U.S.C. (& Supp. V) 410(b)(1) and (b)(2)), subject to the exception that they, like other federal employees, are prohibited from resorting to strikes as a means of resolving bargaining disputes (39 U.S.C. (Supp. V) 410(b)(1)). See generally *United Federation of Postal Clerks* v. *Blount*, 325 F. Supp.

hearing, the arbitrator issued a letter award on October 4, 1979, which was followed on December 31, 1979, by a decision and award (Pet. App. 17a-21a). The arbitrator found that Murphy picketed on July 22, 1978, and failed to report for his next three scheduled shifts because he was "unwilling to cross the picket line," and further found that Murphy had "observed letters distributed by the Postal Service management to the effect that strikes by postal employees were prohibited under law" (Pet. App. 19a). Although Murphy did "support * * * the strike" (*id.* at 20a), the arbitrator nevertheless ordered him reinstated without back pay, because the short duration of Murphy's picketing, coupled with his youth, militated against the imposition of the ultimate penalty of discharge (*id.* at 20a-21a).

2. When the Postal Service refused to reinstate Murphy, petitioner filed suit pursuant to 39 U.S.C. 1208(b) in the United States District Court for the Northern District of California to enforce the arbitration award. The district court denied enforcement of the award (Pet. App. 15a-16a). The court held that 5 U.S.C. 7311[2] prohibits the retention of an employee who strikes against the government, and "an arbitration award which compels the performance of an illegal act cannot be enforced" (Pet. App. 15a).

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879 (D.D.C.), aff'd, 404 U.S. 802 (1971); *United States* v. *Branch 60, National Association of Letter Carriers*, 312 F. Supp. 619 (D. Conn. 1970).

[2]5 U.S.C. 7311 provides that "[a]n individual may not accept or hold a position in the Government of the United States * * * if he * * * (3) participates in a strike * * * against the Government of the United States * * *." Violations of this section are punishable by a fine of up to $1,000 and imprisonment for a term not to exceed one year and one day (18 U.S.C. 1918(3)).

3. The court of appeals affirmed, by a vote of 2-1 (Pet. App. 1a-14a). The court of appeals initially found that the evidence could support only a finding that Murphy had joined the strike. Indeed, the court inferred that the arbitrator himself found that Murphy had engaged in prohibited strike activity from the arbitrator's statement that Murphy gave the strike his "active * * * support" and the arbitrator's refusal to grant Murphy back pay (*id.* at 4a, 5a). The court alternatively held that regardless of the arbitrator's intention, any conclusion that Murphy did not participate in the strike would constitute a "manifest disregard of the law" in view of Murphy's own uncontroverted testimony (*id.* at 6a).

Having found that Murphy had engaged in an illegal strike under 5 U.S.C. 7311, the court of appeals held (Pet. App. 9a) that the arbitration award reinstating Murphy would require "the performance [by the Postal Service] of an illegal act." Accordingly, the court concluded that the award could not be enforced under settled principles of judicial review of arbitration awards.[3]

ARGUMENT

1. Petitioner contends (Pet. 7-10) that the decision of the court of appeals inadequately deferred to the award of the arbitrator as required by prior decisions of this Court.[4] Contrary to petitioner's assertion, however, arbitration awards are not absolutely immune from judicial review, but must be vacated when they conflict with federal law.

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[3]Judge Pregerson dissented. He concluded that the arbitrator's award was ambiguous as to whether Murphy had participated in the strike and that the matter should be remanded to the arbitrator to permit clarification on this question (Pet. App. 10a-11a).

[4]Specifically, petitioner relies upon *United Steelworkers* v. *American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

Accordingly, the decision of the court of appeals is consistent with this Court's prior decisions and does not warrant further review.

An arbitrator "does not sit to dispense his own brand of industrial justice," and the "courts have no choice but to refuse enforcement" of awards that exceed the arbitrator's limited authority to interpret and apply the collective bargaining agreement. *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). At bottom, "[t]he power of the federal courts to enforce the terms of private [arbitration] agreements is at all times exercised subject to the restrictions and limitations of public policy of the United States as manifested in the Constitution, treaties, federal statutes, and applicable legal precedents." *Hurd* v. *Hodge*, 334 U.S. 24, 34-35 (1948). See *International Brotherhood of Teamsters* v. *Washington Employers, Inc.*, 557 F.2d 1345, 1350 (9th Cir. 1977); *Local 453, International Union of Electrical Workers* v. *Otis Elevator Co.*, 314 F.2d 25, 29 (2d Cir.) (Marshall, J.), cert. denied, 373 U.S. 949 (1963). Based on these settled principles, the courts of appeals have routinely refused enforcement of two related categories of arbitration awards: those requiring the complying party to violate the law,[5] and those that are plainly contrary to a recognized public policy.[6] The decision

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[5]See, *e.g.*, *General Warehousemen & Helpers Local 767* v. *Standard Brands, Inc.*, 579 F.2d 1282, 1293 (5th Cir. 1978) (en banc), cert. dismissed, 441 U.S. 957 (1979); *Banyard* v. *NLRB*, 505 F.2d 342 (D.C. Cir. 1974); *Associated Milk Dealers, Inc.* v. *Milk Drivers Local 753*, 422 F.2d 546, 552-553 (7th Cir. 1970); *Glendale Manufacturing Co.* v. *Local No. 520, International Ladies' Garment Workers Union*, 283 F.2d 936, 940 (4th Cir. 1960), cert. denied, 366 U.S. 950 (1961); *Evans* v. *Hudson Coal Co.*, 165 F.2d 970 (3d Cir. 1948).

[6]See, *e.g.*, *Local No. P-1236, Amalgamated Meat Cutters & Butcher Workmen* v. *Jones Dairy Farm*, 680 F.2d 1142 (7th Cir. 1982); *Johns-Manville Sales Corp.* v. *International Association of Machinists, Local Lodge 1609*, 621 F.2d 756, 759 (5th Cir. 1980); *Truck Drivers Local Union No. 807* v. *Bohack Corp.*, 541 F.2d 312 (2d Cir. 1976).

below conforms to these established principles, since the order to reinstate an employee found to have participated in a strike against the government would have required the Postal Service to act in contravention of the mandate of 5 U.S.C. 7311.

That statute unequivocally states that "[a]n individual may not accept or hold a position in the Government of the United States * * * if he * * * (3) participates in a strike * * * against the Government of the United States * * *." As the court below correctly concluded, the arbitrator's order to reinstate Murphy would have required the Postal Service to continue to employ a proven strike participant. Not only is this result contrary to the plain meaning of the statute, but also it is clearly repugnant to the strong public policy against strikes by federal employees — a policy that is embodied in Section 7311 and its predecessors and is the basis for a panoply of civil and criminal anti-strike legislation.[7]

The arbitrator in this case simply rendered an independent policy determination that the sanction for striking ought to be less stringent than discharge if mitigating circumstances can be demonstrated. But as the court of appeals correctly held: "The choice of sanctions * * * is not arbitrable; that choice has already been made by Congress" (Pet. App. 7a).[8]

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[7]Indeed, the policy commitment against strike participation by federal employees is so firm that Congress has branded the violation of 5 U.S.C. 7311 a felony (see 18 U.S.C. 1918) and has redefined the term "federal employee" in the Civil Service Reform Act explicitly to exclude strike participants. 5 U.S.C. (Supp. V) 7103(a)(2)(B)(v). See also *United States* v. *PATCO*, 653 F.2d 1134, 1138-1139 (7th Cir. 1981).

[8]There is no basis for petitioner's claim (Pet. 9) that the decision of the court below conflicts with *Boire* v. *International Brotherhood of Teamsters*, 479 F.2d 778, 803 (5th Cir. 1973), and *NLRB* v. *Horn & Hardart Co.*, 439 F.2d 674, 678 (2d Cir. 1971). Petitioner quotes

Petitioner suggests (Pet. 9-10) that this case raises issues akin to those presented in *W. R. Grace & Co.* v. *Local Union No. 759, International Union of Rubber, Cork, Linoleum & Plastic Workers*, No. 81-1314 (cert. granted, June 28, 1982). But the proper disposition of this case is in no way contingent on the outcome of that case. In *W. R. Grace*, an arbitrator refused to grant back pay to white employees who had been laid off ahead of minority employees, because the layoffs had been conducted pursuant to a Title VII (42 U.S.C. 2000e, *et seq.*) conciliation agreement negotiated by the Equal Employment Opportunity Commission. However, a second arbitrator granted back pay to other white employees, and that award ultimately was upheld by the court of appeals.

The first two issues presented in *W. R. Grace* deal with the validity and effect of the first arbitrator's award and have nothing to do with this case. Only if the Court holds against the company on those issues will it even be required to consider whether the second arbitral award is repugnant to the public policy favoring settlement of Title VII litigation. But there is no dispute in *W. R. Grace* as to whether an award that violates federal law or public policy is unenforceable; the only issue is whether the Title VII policy favoring settlements is sufficiently compelling to warrant setting aside the decision of the arbitrator. The public policy

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isolated passages from those cases to the effect that an arbitrator must look only to the four corners of the collective bargaining agreement, and suggests on the basis of that proposition that an arbitrator's decision must be enforced without regard to the contrary dictates of external law. But *Boire* and *Horn & Hardart* held exactly the opposite. In both cases, the NLRB had refused to defer to arbitral awards that were in conflict with the representational requirements of the NLRA. In each case, the court recognized that the NLRB had primary authority to interpret and apply the NLRA and refused to honor the awards precisely because they were in violation of federal statutes that the arbitrators were not equipped or required to construe.

embodied in Section 7311 against reinstating federal employees who strike against the government has been declared by Congress with unmistakable clarity and compels the result reached by the court of appeals. Moreover, while the arbitrator's award in *W. R. Grace* may not itself have violated Title VII, the arbitrator's award in this case is plainly contrary to Section 7311. Thus, even if this Court in *W. R. Grace* rejects Title VII conciliation policy as sufficient to warrant vacating the arbitrator's award, it would in no way undermine the validity of the decision below, which is based on a wholly different statutory scheme and purpose.

2. Petitioner contends (Pet. 10-11) that the rule barring enforcement of arbitral awards that contravene federal law may be avoided here because the arbitrator's decision can be construed to support the conclusion that Murphy did not participate in the strike. Petitioner asserts that the decision below, which declined to interpret the arbitrator's award as ambiguous, conflicts with the principle that a reviewing court must uphold an arbitral award if it is susceptible to an interpretation that does not place it at odds with prevailing law and public policy (Pet. 10-11).[9]

There is no conflict here. The court of appeals found that the arbitration award was susceptible to only one conclusion—that Murphy had participated in the strike. That factual determination is fully supported by a plain reading of the arbitrator's decision, which described Murphy as having supported the strike and which refused to grant Murphy back pay. Moreover, in light of Murphy's own statements, the court held that any finding that Murphy did not engage in the strike would have required a manifest

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[9]See, *e.g.*, *NLRB* v. *Pincus Brothers, Inc.-Maxwell*, 620 F.2d 367 (3d Cir. 1980); *Douglas Aircraft Co.* v. *NLRB*, 609 F.2d 352, 354 (9th Cir. 1979).

disregard of the law. The court of appeals' reading of the arbitrator's decision does not warrant review by this Court.

3. Finally, petitioner argues (Pet. 11-12) that the arbitrator's award does not violate federal law or policy because 5 U.S.C. 7311 does not absolutely prohibit the Postal Service from retaining an employee found to have participated in a strike. In support of this argument, petitioner relies on statements in *United States* v. *PATCO*, 653 F.2d 1134, 1141 (7th Cir. 1981), and *United States* v. *PATCO*, 438 F.2d 79, 82 (2d Cir. 1970), to the effect that the United States might not be required to terminate or to prosecute criminally all air traffic controllers who participated in certain work slow-downs. This argument is without merit.

First, petitioner never argued below that the discharge of a striker was not anticipated by 5 U.S.C. 7311. The majority observed that there was no controversy over this question (Pet. App. 3a-4a), and even the dissent assumed that Section 7311 requires an arbitrator to uphold the dismissal of an employee found to have participated in a strike against the United States (Pet. App. 11a & n.2). Because it was neither raised nor considered below, petitioner's contention that Section 7311 does not require the discharge of a proven striker was not properly preserved for review by this Court. See *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In any event, there is no inconsistency between the decision below and the statements in the two *PATCO* cases. The question decided in both of those cases was whether 5 U.S.C. 7311 provides a basis for an anti-strike injunction. Even if those cases had squarely held that the United States is not required to seek the discharge of every employee who is alleged to have participated in prohibited strike activity—which would be tantamount to a determination that the United States has prosecutorial discretion whether or not to invoke 5 U.S.C. 7311 and 18 U.S.C. 1918—they would still

not mean that a federal court is entitled to disregard the statute in reviewing an arbitrator's decision to reinstate an employee against whom the government has invoked its statutory authority to discharge, and who is found in the arbitration proceeding to have engaged in a strike. Since the decision below conflicts with no decision of this Court or any other court of appeals, further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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